No. 81-2307

In The

Supreme Court of the United States

October Term, 1982

Bill Johnson's Restaurants, Inc.,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

J. Albert Woll
815 15th Street, N.W.
Washington, D.C. 20005

Laurence Gold
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5290
(Counsel of Record)

Of Counsel:

Michael H. Gottesman
Jeremiah A. Collins
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the respondent in the instant case.

The AFL-CIO is a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women. This case is of concern to the AFL-CIO in two respects.

First, the case presents the question whether an employer violates the National Labor Relations Act by prosecuting a lawsuit without having any basis in fact to support the suit, for the sole purpose of punishing employees for filing a charge with the National Labor Rela-

tions Board ("Board") and for engaging in other protected activities, and if so, whether the Board is authorized to order the employer to cease and desist from prosecuting the suit. The resolution of those issues will have a substantial impact on the interests of the AFL-CIO and its members, and the accompanying brief *amicus curiae* presents the AFL-CIO's arguments as to their proper resolution.

Second, the accompanying brief explains why this case does *not* present any questions concerning a subject to which the bulk of the Brief for Petitioner is devoted: the doctrine of federal preemption based on the exclusive primary jurisdiction of the Board, as developed in *San Diego Unions v. Garmon*, 359 U.S. 236, and subsequent cases such as *Farmer v. Carpenters*, 430 U.S. 290, and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180. The AFL-CIO has a significant interest in presenting its views as to how petitioner has misconceived the nature of the issues presented in this case, and as to why the doctrine of the Board's primary jurisdiction is not implicated here.*

---

* It was our understanding that the respondent had secured an extension of time for filing its brief to Monday, January 31, 1983. In fact, as we learned on Friday, January 28, 1983, that extension of time was only until January 28th. Once our confusion on this score was corrected we made arrangements to serve counsel for the parties with final page proof on the due date, to file the printed motion and brief with the Court at approximately 10 a.m. on Monday, January 31st, and to serve those copies on counsel for petitioner by express mail and on counsel for respondent by hand. Since our error will not delay consideration of the case nor disadvantage the parties we respectfully request that despite that error this motion be granted.

CONCLUSION

For the above-stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Of Counsel:

MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	4
CONCLUSION	19

TABLE OF AUTHORITIES

Cases:

Allen-Bradley Local v. Wisconsin Board, 315 U.S. 740	10
Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511	13, 19
Automobile Workers v. Russell, 356 U.S. 634	10
Booster Lodge 405 v. NLRB, 412 U.S. 84	3, 12
California Motor Transport v. Trucking Unlimited, 404 U.S. 508	12
Capital Service, Inc. v. NLRB, 347 U.S. 501	3, 11
Clyde Taylor Co., 127 NLRB 103	13, 15
Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656	10
Farmer v. Carpenters, 430 U.S. 290	10, 11
Frank Visceglia, 203 NLRB 265, enf. den. on other grds. 498 F.2d 43 (3rd Cir. 1974)	15
Garrison v. Louisiana, 379 U.S. 64	16
Gertz v. Robert Welch, Inc., 418 U.S. 323	16
Graver Mfg. Co. v. Linde Co., 336 U.S. 271	8
Hill v. Florida, 325 U.S. 358	11
Linn v. Plant Guard Workers, 383 U.S. 53	10
Machinists v. Gonzales, 356 U.S. 617	10
Machinists v. Wisconsin Empl. Rel. Comm'n, 427 U.S. 132	11
Maher v. Gagne, 448 U.S. 122	8
Mitchum v. Foster, 407 U.S. 225	4, 19
Namet v. United States, 373 U.S. 179	7
Nash v. Florida Industrial Comm'n, 389 U.S. 121	12, 13
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274	17
Machinists v. Wisconsin Empl. Rel. Comm'n, 427 U.S. 132	11

TABLE OF AUTHORITIES—Continued

	Page
Maher v. Gagne, 448 U.S. 122	8
Mitchum v. Foster, 407 U.S. 225	4, 19
Namet v. United States, 373 U.S. 179	7
Nash v. Florida Industrial Comm'n, 389 U.S. 121	13
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274	17
New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96	12
New York Times Co. v. Sullivan, 376 U.S. 254	16
NLRB v. Gissel Packing Co., 395 U.S. 575	15
NLRB v. Nash-Finch Co., 404 U.S. 138	3, 4, 11, 13, 19
NLRB v. Scrivener, 405 U.S. 117	13
NLRB v. Transportation Management Corp., No. 72-168	17
Otter Tail Power Co. v. United States, 410 U.S. 366	12
Otter Tail Power Co. v. United States, 417 U.S. 901	12
San Diego Unions v. Garmon, 359 U.S. 236	9, 11
Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180	9, 10, 11, 13
Shepard v. Labor Board, —— U.S. ——, 51 U.S.L.W. 4087 (aJn. 18, 1983)	18
Teamsters v. Morton, 377 U.S. 252	11
United Credit Bureau v. NLRB, 454 U.S. 997	16
Universal Camera Corp. v. Labor Board, 340 U.S. 474	8
Vendco Co. v. Lektro-Vend Corp., 433 U.S. 623	12, 13, 19
Youngdahl v. Rainfair, Inc., 355 U.S. 131	10
Anti-Injunction Act	
28 U.S.C. § 2283	4, 12, 18
National Labor Relations Act, as amended	
§ 8(a)(1), 29 U.S.C. § 158(a)(1)	*passim*
§ 8(a)(4), 29 U.S.C. § 158(a)(4)	*passim*
§ 10(c), 29 U.S.C. § 160(c)	3, 17
Other Authorities:	
Restatement (Second) of Torts (1977)	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2257

BILL JOHNSON'S RESTAURANTS, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

SUMMARY OF ARGUMENT

1. It is undisputed in this Court that petitioner Bill Johnson's Restaurant committed a series of unfair labor practices, including an unlawful threat to "get even" with employees who had engaged in conduct protected by the National Labor Relations Act ("the Act"). This case concerns the particular manner in which petitioner carried out that threat: the prosecution of a lawsuit in state court against the employees, seeking more than $500,000 in damages.

The National Labor Relations Board found that petitioner filed the suit without having any basis in fact for the allegations made in its complaint, and that petitioner's sole motive for filing the suit was—by subjecting the employees to the costs and burdens of defending the suit—to "punish" them for filing an unfair labor practice charge with the NLRB and for engaging in other protected activities. On the basis of these findings, the Board concluded that petitioner's prosecution of the suit violated Sections 8(a)(1) & (4) of the Act, and "[i]n order to dissipate the effect of [petitioner's] unfair labor practices" the Board ordered, *inter alia*, that petitioner withdraw the suit. The Court of Appeals, concluding that the Board's findings were supported by substantial evidence, enforced the Board's order.

2. In attacking the Board's order, much of petitioner's brief is addressed to a point that is not properly in issue. Petitioner characterizes that order as one premised on the doctrine of federal preemption that flows from the Board's exclusive primary jurisdiction. In petitioner's words, the decisions below rest on "the theory that the Board assumes preemptive jurisdiction of a libel claim once an unfair labor practice charge is filed".[1] But neither the Board nor the Court of Appeals proceeded on any such theory. The Board did not mention preemption at all in finding petitioner's suit to be an unfair labor practice and ordering that it be withdrawn; and the Court of Appeals was explicit that the Board's order warranted enforcement "[w]hether or not the state court's jurisdiction [wa]s technically preempted." The suit was ordered withdrawn here only after the Board had adjudicated that its prosecution was unlawful, not "once an unfair labor practice charge [wa]s filed". This case, accordingly, does not present the question whether the state court should have viewed itself as lacking jurisdiction of petitioner's suit by virtue of federal preemption. Nor does

[1] Brief for petitioner at 19.

the case present the question whether, at any particular point, the Board could properly have obtained in federal court an injunction against the prosecution of petitioner's suit on the ground that it was preempted, pursuant to the doctrine of *NLRB v. Nash-Finch Co.*, 404 U.S. 138, or *Capital Service, Inc. v. NLRB*, 347 U.S. 501. Quite simply, no issues of preemption—as that term is ordinarily understood—are presented in this case.

3. (a) With respect to the issues that *are* presented here, it is too late in the day to argue that the prosecution of a lawsuit in state court is *per se* immune from being denominated an unfair labor practice; for this Court has previously held that in certain instances a party "commits an unfair labor practice in seeking [state] court enforcement" of alleged claims against employees. *Booster Lodge 405 v. NLRB*, 412 U.S. at 84, 85. And, with respect to the particular lawsuit at issue in this case, petitioner's prosecution of the suit without having any factual basis for the allegations made therein, and for the sole purpose of punishing employees for filing an NLRB charge and exercising their § 7 rights, violates both the terms and the policies of Sections 8(a)(4) and (1) of the Act. Where, as here, an employer's resort to the courts is in bad faith, and he has no basis in fact for his professed claims but asserts them solely to retaliate against employees for their exercise of protected rights, to exempt the employer from liability on the basis of an asserted right to pursue claims in court would be to subordinate important federal statutory interests to a "right" which, as found below, has been invoked by the employer only in appearance, not in actuality.

(b) The Court of Appeals correctly reasoned that "[s]ince the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice." Section 10(c) of the Act, 29 U.S.C. § 160(c), specifically requires that if the Board

finds that any person has committed an unfair labor practice, "the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of th[e] Act." Only by issuing the order in dispute could the Board be faithful to that command.

(c) Petitioner's final contention, that the Board's order requiring it to withdraw its suit was contrary to the Anti-Injunction Act, 28 U.S.C. § 2283, is frivolous. The legality under federal law of prosecuting the sham lawsuit was properly before the Board on an unfair labor practice charge, and the Board found that the prosecution of the suit constituted a violation of federal law. That being so, the case presents a "superior federal interest" which, when asserted by a federal agency (as opposed to a private party), provides an established basis for enjoining a state court suit notwithstanding the Anti-Injunction Act. *NLRB v. Nash-Finch Co.*, *supra*; *Mitchum v. Foster*, 407 U.S. 225, 235-236.

ARGUMENT

1. Because the Brief for Petitioner seeks to obscure the narrow question that is properly presented for review, we begin by placing in context the holdings of the Board and the Court of Appeals that are at issue here.

a) This case involves a series of unfair labor practices committed by petitioner Bill Johnson's Restaurant. First, petitioner discharged Myrland Helton, a waitress, because of her efforts to organize the restaurant's employees.[2] Next, petitioner unlawfully interrogated another employee concerning union activities.[3] Then, after the

[2] Pet. App. A-6 to A-8 (Court of Appeals decision); *id.* at A-21 to A-29 (decision of Administrative Law Judge ("ALJ")).

[3] *Id.* at A-9 (Court of Appeals decision); *id.* at A-29 to A-30 (ALJ decision).

Board had issued a complaint with respect to the violations just described, when Helton and others peacefully picketed the restaurant protesting Helton's unlawful discharge and asserting other grievances, petitioner responded with yet another unfair labor practice, in the form of "threats [that] were designed to persuade the picketers to cease their lawful activities. . . ."[4] Among other coercive statements, petitioner vowed to "get even" with Helton and the other pickets.[5]

In this Court the Board's determinations, affirmed by the Court of Appeals, that petitioner committed each of the unfair labor practices just noted, including the unlawful threat to "get even" with the employees who had engaged in protected activity, are not challenged.[6] Rather, the issues presented to this Court for review evolve out of the particular manner in which petitioner proceeded to carry out that threat: the prosecution by petitioner of a lawsuit in state court against Helton and the other pickets claiming more than $500,000 in damages.[7]

b) The complaint in petitioner's state-court suit alleged that the pickets had wrongfully interfered with the restaurant's business by engaging in "mass picketing and harassment,"[8] and that they had libeled petitioner

---

[4] Pet. App. A-34 (ALJ decision); *see also id.* at A-14, n.2 (Board decision); *id.* at A-9 (Court of Appeals decision).

[5] *Id.* at A-32—A-34 (ALJ decision); *id.* at A-14, n.2 (Board decision); *id.* at A-9 (Court of Appeals decision).

[6] "As it is clear on this record that the picketing being conducted was a protected concerted activity, it is equally clear that [the restaurant's] threat to get even with [the pickets] for engaging in such activity violated . . . the Act." *Id.* at A-33 (ALJ decision.)

[7] As the Board found, petitioner's "threat to get even . . . ultimately culminated in the filing of the civil suit . . ." *Id.* at A-34 (ALJ decision).

[8] Jt. App. 3-4.

by making false statements, including "misrepresentations of proceedings pending before the National Labor Relations Board. . . ." [9] On its face, of course, there was nothing inappropriate about the complaint. The Board, after a full unfair labor practice hearing, found, however, that petitioner had no basis in fact for the allegations made in the complaint; [10] and, reviewing the record as a whole, the Board concluded that "the true purpose behind the lawsuit was to punish Helton for having filed the charge [with the Board concerning her discharge] . . . , and to punish the picketers for engaging in protected concerted activity, and to prevent them from further asserting those rights." [11] Petitioner's motive, the Board found, was to retaliate for the protected activities already undertaken by subjecting Helton and the pickets to the costs and burdens of litigation, and to place its other employees "on notice" that if they engaged in protected activities petitioner might retaliate against them in the same manner.[12]

On the basis of these findings, the Board held that by filing and prosecuting the suit petitioner violated Sections 8(a)(1) and 8(a)(4) of the Act.[13] "In order to

---

[9] *Id.* at 4, 6-7.

[10] Pet. App. A-40 to A-42 (ALJ decision).

[11] *Id.* at A-42 (ALJ decision). See also *id.* at A-52 (ALJ decision).

[12] *Id.* at A-42 (ALJ decision).

[13] *Ibid.* See also *id.* at A-52 (ALJ decision). Section 8(a)(1), 29 U.S.C. § 158(a)(1), provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." The "rights guaranteed in Section 7", 29 U.S.C. § 157, include "the right to self-organization, to form, join, or assist labor organizations . . ., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(4), 29 U.S.C. § 158(a)(4), makes it an unfair labor practice "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

dissipate the effect of [petitioner's] unfair labor practices," the Board ordered that petitioner "[c]ease and desist from . . . [p]rosecuting its complaint. . . .," and withdraw the complaint and reimburse Helton and the other state-court defendants "for all legal expenses incurred in the defense of said lawsuit. . . ." [14]

The Court of Appeals affirmed the Board's finding "that the lawsuit was filed in bad faith to retaliate against the picketers".[15] The court expressly found "that there is substantial evidence in the record to support the Board's findings that the restaurant's lawsuit lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity." [16]

c) Although much of the Brief for Petitioner is written as if petitioner's lawsuit had been filed in good faith, rather than in bad faith as found below, we take the Board's findings of fact, affirmed by the Court of Appeals, as established for purposes of our submission. Petitioner has not sought to challenge those findings in this Court,[17] and there would in any event be no occasion to set aside the concurrent findings of the Board

---

[14] Pet. App. A-53 to A-54 (ALJ decision).

[15] *Id.* at A-10 (Court of Appeals decision).

[16] *Ibid.* Because the Board and the court below relied upon the combination of *both* petitioner's lack of a factual basis for the suit and petitioner's unlawful motivation for its institution, this case presents no questions as to the propriety of finding an unfair labor practice and/or ordering withdrawal of a lawsuit where only one or the other (but not both) of these facts is found. See also note 34 *infra*.

[17] The questions on which certiorari was sought and granted do not include any challenge to the findings of fact (cf. *Namet v. United States*, 373 U.S. 179, 190), and even in its brief petitioner does not argue that the Board's findings were not supported by substantial evidence; for the most part, petitioner simply ignores the pertinent findings.

and the Court of Appeals. "Whether on the record as a whole there is substantial evidence to support agency findings is a question Congress has placed in the keeping of the Court of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 491. And, proper occasions for such intervention are particularly rare where what is in question are the concurrent findings of the Board and the court of appeals. *Maher v. Gagne*, 448 U.S. 122, 129-130; *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275.

Thus, given the facts as found by the Board and the Court of Appeals, the questions to be decided in this case are (i) whether an employer violates the Act by prosecuting a baseless lawsuit for the sole purpose of retaliating against one employee for filing a charge with the Board and against others for engaging in protected concerted activity in support of the charging party, and (ii) if so, whether the Board is authorized to order the employer to cease and desist from prosecuting the suit. We address those questions at pp. 11-19 *infra*.[18]

2. Before turning to those questions, however, it is important to understand that this case does *not* present any questions concerning a subject to which the bulk of the Brief for Petitioner is devoted: the doctrine of federal

[18] The questions on which certiorari was sought and granted do not place in issue—assuming the unfair labor practice properly was found—the propriety of the Board's ordering petitioner to reimburse the employees for their legal expenses incurred in the defense of the lawsuit, and accordingly we do not discuss that question. In addition, although the Board addressed the question whether petitioner also violated the Act in taking certain depositions, the Court of Appeals properly declined to reach that question, because the court concluded that the prosecution of the suit was in itself unlawful. Pet. App. A-12. The issue of the depositions is likewise outside the scope of the questions on which certiorari was sought and granted, and we do not address it.

preemption based on the exclusive primary jurisdiction of the Board, as developed in *San Diego Unions v. Garmon*, 359 U.S. 236, and subsequent cases such as *Farmer v. Carpenters*, 430 U.S. 290, and *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180.

The Brief for Petitioner suggests that this case presents the kinds of issues that are the subject of the *Garmon* doctrine; the brief speaks time and again of such issues as the extent to which "the states must . . . yield to the primary jurisdiction of the NLRB" [19] and the question of "what conduct remain[s] subject to state court scrutiny during a labor dispute." [20] Although petitioner does not explain why such issues are implicated in this case, its submission appears to rest on the assertion that the Court of Appeals decided this case on "the theory that the Board assumes preemptive jurisdiction of a libel claim once an unfair labor practice charge is filed." [21]

But the Court of Appeals did not adopt such a theory. Rather, that court held that it was proper for the Board to order petitioner to withdraw its suit *after the Board had found that the prosecution of the suit was an unlawful act*—not "once an unfair labor practice charge [wa]s filed." Furthermore, as the court below explained, the suit was ordered to be withdrawn because the suit was an "unfair labor practice" [22] and "[w]hether or not the state court's jurisdiction [wa]s technically *preempted*." [23] And the Court of Appeals' approach paralleled

---

[19] Brief for Petitioner at 8.

[20] *Id.* at 11.

[21] *Id.* at 19.

[22] "Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice." Pet. App. A-12 (Court of Appeals decision).

[23] Pet. App. A-13 (Court of Appeals decision) (emphasis added).

the Board's; indeed, in discussing its decision to order the withdrawal of the suit the Board did not even mention the *Garmon* preemption doctrine.[24]

Thus, neither the Board nor the Court of Appeals held that the state court's jurisdiction over the subject matter of petitioner's suit was preempted by the primary jurisdiction of the Board; both held only that petitioner had violated the Act by prosecuting in bad faith its baseless and retaliatory lawsuit, and that petitioner should be ordered to cease and desist from that unlawful conduct.

This case therefore does not present the question whether the state court lacked jurisdiction of petitioner's suit from the outset by virtue of federal preemption.[25]

---

[24] See Pet. App. A-34 to A-43, A-52 to A-53 (ALJ decision).

[25] Petitioner's state court complaint was drafted to allege a claim for malicious libel, which would ordinarily not be preempted (*Linn v. Plant Guard Workers*, 383 U.S. 53); and the complaint can be construed to allege a claim for picket-line misconduct of a sort that would likewise ordinarily not be preempted (*Automobile Workers v. Russell*, 356 U.S. 634; *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131; *Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656; *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740). However, in none of the decisions just cited does it appear that the party accused of misconduct in the state court action had filed a charge with the Board contending that the precise conduct attacked in the state court complaint was, in actuality, of a nature that is protected under the Act. (Nor had such a charge been filed in *Farmer v. Carpenters*, 430 U.S. 290, or *Machinists v. Gonzales*, 356 U.S. 617.) Here, such a charge was filed, and was ultimately found by the Board to be well taken.

Since the question whether the pickets' conduct was protected by the Act was properly presented to the Board by Helton's charge, it follows, we believe, that the filing of the charge should have operated to preempt state court jurisdiction of the restaurant's suit, which challenged the same conduct as actionable. See *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 202, 207 and n.44. But compare *id.* at 208-210 (Blackmun, J., concurring), with *id.* at 212-214 (Powell, J., concurring). However, this Court has not explored how the principles discussed in *Sears* should be applied where, as here, a state court complaint on its face concerns matters that are not preempted,

[Continued next page]

Nor does the case present the question whether, at any particular point, the Board could properly have obtained in federal court an injunction against the prosecution of the restaurant's suit on the ground that it was preempted, pursuant to the doctrine of *NLRB v. Nash-Finch Co.*, 404 U.S. 138, or *Capital Service, Inc. v. NLRB*, 347 U.S. 501.[26] Quite simply, no issues of preemption stemming from the *Garmon* line of cases are presented in this case.[27]

3. What *is* presented here, as has been noted, is (i) the question whether an employer violates the Act by prosecuting a baseless lawsuit for the sole purpose of retaliating against one employee for filing a charge with the Board and against others for engaging in protected concerted activity in support of the charging party, and (ii) if so, whether the Board is authorized to order the employer to cease and desist from prosecuting the suit. As we now show, the answer to both questions is yes.

---

but the state court defendant has filed a charge with the Board presenting a substantial (and here, well-taken) contention that his conduct is actually protected by the Act.

Thus, the issue just discussed which, as we stress, is not presented, is an open one in this Court.

[26] See also *Sears, supra*, 436 U.S. at 207 n.43 (discussing *Nash-Finch* and *Capital Service*.)

[27] This Court's decisions have recognized that the labor preemption doctrine consists of two distinct sets of principles. One branch of the doctrine, discussed in the text, is "based predominantly on the primary jurisdiction of the Board . . . [and] was developed in *San Diego Unions v. Garmon* . . . ." See *Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 138. The other branch is based on the principle that state regulation of a labor dispute is preempted if the rule applied by the state conflicts with the governing federal *substantive* law. See *Machinists, supra*, 427 U.S. at 140-161; *Teamsters v. Morton*, 377 U.S. 252; *Hill v. Florida*, 325 U.S. 358. Cf. *Farmer v. Carpenters, supra*, 430 U.S. at 295 n.5. Petitioner does not contend that the Board's order here conflicts with this Court's rulings on this second branch of the preemption doctrine.

a) It is too late in the day to argue that the prosecution of a lawsuit in state court is *per se* immune from being denominated an unfair labor practice. In *Booster Lodge 405 v. NLRB*, 412 U.S. 84, 85, this Court squarely held that the Board is "authorize[d] . . . to find that a union commits an unfair labor practice in *seeking* [*state*] *court enforcement* of fines imposed for strikebreaking activities by employees who have resigned from the union, even though the union constitution expressly prohibits members from strike-breaking" (emphasis added). That ruling is but one illustration of the more general proposition, recognized both in the common law and this Court's decisions, that the right to assert claims in state court is not an absolute.[28]

---

[28] The common law recognizes a cause of action for "wrongful use of civil proceedings." Restatement (Second) of Torts § 674 (1977). See also *id.* § 682 (abuse of process). And this Court has addressed somewhat similar problems under the federal antitrust laws. In *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, the Court made clear that the prosecution of "sham" suits before state courts or agencies in an effort to restrain competition is in some instances an antitrust violation subject to injunction. See also *Otter Tail Power Co. v. United States*, 410 U.S. 366; *same*, 417 U.S. 901 (summary affirmance following remand); *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 110 n.15. However, the Court has divided as to the precise circumstances in which such suits may properly be enjoined. In *Vendco Co. v. Lektro-Vend Corp.*, 433 U.S. 623, three justices concluded that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court from enjoining state court litigation at the behest of a *private party* under the federal antitrust laws, although *future* litigation may be enjoined. *Id.* at 635 n.6 (opinion of Rehnquist, J.). Two justices concluded that the Anti-Injunction Act is not applicable, but that state court litigation cannot properly be enjoined as an antitrust violation if what is at issue is a single lawsuit, rather than a "pattern of baseless, repetitive claims". *Id.* at 643-645 (opinion of Blackmun, J.). Four justices concluded that even where only a single suit is involved, an injunction against the further prosecution of the suit is appropriate relief under the antitrust laws in certain cases. *Id.* at 661 (opinion of Stevens, J.). Since three of the justices in the majority in *Vendco* rested their conclusions on the Anti-Injunction Act, which is not applicable in this case (see pp. 18-19 *infra*), and since *Vendco* and its precursors in-

To be sure, that some lawsuits may be unfair labor practices does not mean that all are.[29] But as we now show, the findings in the instant case establish that the prosecution of the lawsuit at issue here *was* an unfair labor practice.

Section 8(a)(4) of the Act provides that an employer may not "discriminate" in any fashion against an employee "because he has filed charges . . . under this Act." This Court has construed that provision broadly, recognizing that "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *NLRB v. Scrivener*, 405 U.S. 117, 121, quoting *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238. The provision has thus been understood to proscribe all "coercive actions which . . . ha[ve] a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board." *Nash*, *supra*, 389 U.S. at 239. A lawsuit brought in bad faith as a means of retaliation against an

---

volved the antitrust laws rather than the NLRA, those decisions provide guidance with respect to the question presented here only in their recognition that the right of access to the courts is not absolute.

[29] In *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 520, the Court noted, without deciding, the possibility "that, if an employer resorts to a state court in relation to conduct that is obviously taken over by the Taft-Hartley Act and outside the bounds of state relief, it may . . . under appropriate circumstances give ground for a finding of an unfair labor practice." In *Nash-Finch*, *supra*, the Court observed, without suggesting its approval, that the Board has held that "a resort to court action . . . does not violate § 8(a)(1)." 404 U.S. at 142, citing *Clyde Taylor Co.*, 127 NLRB 103, 109. In *Sears*, *supra*, the Court quoted that passage from *Nash-Finch*, but left room for the possibility that the Board might "alter its position in cases of this kind. . . ." 436 U.S. at 208, n.44. Neither *Nash-Finch* nor *Sears* involved litigation brought in bad faith. See *Nash-Finch*, 404 U.S. at 154 (White, J., dissenting); *Sears*, 436 U.S. at 185-187.

employee for filing a charge falls squarely within Section 8(a)(4)'s prohibition as so construed.

Similarly, where, as here, a baseless suit is brought to retaliate against employees for having exercised "the right to self-organization, to form, join, or assist labor organizations . . . , and to engage in other concerted activities for . . . mutual aid or protection" (Section 7), it is manifest that the employer has "interfere[d] with, restrain[ed], or coerce[d] employees in the exercise of the rights guaranteed in Section 7," and has thereby violated the plain terms of Section 8(a)(1).

Petitioner has not taken issue with the proposition that the kind of baseless, retaliatory litigation found to have been pursued in this case falls within the plain terms of Sections 8(a)(1) and (4). Nor has petitioner pointed to any legislative history that might exempt such lawsuits from the reach of the Act, and we are aware of none. Indeed, petitioner goes so far as to concede that a violation may properly be found "[w]hen the state cause of action is based upon or would restrict employee access to the Board" [30]—although petitioner fails to recognize that under the facts found by the Board in this case, that rule would require affirmance of the Board's order.[31]

Rather, petitioner's argument that its conduct in prosecuting the lawsuit is not an unfair labor practice is based on the notion that "[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." Brief for

---

[30] Brief for Petitioner at 13.

[31] Petitioner suggests that a distinction should be drawn between cases where the "declared objective for suit, as stated in the complaint," is unlawful, and cases where the unlawful objective is established through other evidence. Brief for Petitioner at 15. Certainly no such distinction can be derived from the terms of §§ 8(a)(1) and (4).

Petitioner at 15, quoting *Frank Visceglia*, 203 NLRB 265, 272, *enf. den. on other grds.*, 498 F.2d 43 (3d Cir. 1974). But that is *not* the ground upon which petitioner's conduct was "called an unfair labor practice."

The Court of Appeals in this case fully accepted the proposition that "[b]efore condemning a lawsuit as an unfair labor practice . . . , the Board must be careful to make an accommodation between the rights of all persons to seek resolution of their legal claims in court and the rights of employees under the NLRA." Pet. App. A-9, citing *Clyde Taylor*, 127 NLRB 103, 109. As part of that accommodation, that court described with approval the Board's policy that an employer who brings a suit in good faith against conduct that he believes to be unlawful will not be held to have violated the Act merely because it is ultimately found that the employees' conduct was in fact lawful and protected by the Act. Pet. App. A-10. But where, as here, an employer sues without any basis in fact to justify his allegations, and does so in bad faith solely as a means of retaliating against employees for having exercised their rights under the Act, no principle of "accommodation" requires the conclusion that the employer should be left free to pursue such a course. For in such a case, it only *appears* that the employer is exercising the right to "seek resolution of [his] legal claims in court;" in reality, the employer is merely engaging in harassment, with no good faith interest in seeking vindication of any colorable legal claims.

An employer's right to prosecute suits against employees, like the employer's right to engage in free speech, "cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1)...." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617. Where, as here, the employer pursues in bad faith, and without basis in fact, a suit designed solely to punish employees for their exercise of Section 7 rights, the balance plainly tips in favor of enforcing the commands of the Act. To exempt

the employer from liability on the basis of an asserted right to pursue claims in court would be to subordinate important federal statutory rights to a "right" which, as found below, has been invoked by the employer only in appearance, not in actuality.[32]

Accordingly, where the Board has properly "ascertain[ed] the intent behind the suit [and] its potential coercive effects upon employees," [33] and has found as fact

---

[32] An instructive analogy may be found in this Court's decisions striking a balance between a publisher's right of free speech and a defamed individual's right to vindicate his reputation. In *New York Times Co. v. Sullivan*, 376 U.S. 254, the Court stated that the right of a publisher to criticize a public official could not adequately be protected by affording to the publisher the defense of truth in a libel action, because "[a] defense for erroneous statements *honestly made* is no less essential . . .," as a means of avoiding undue "self-censorship." *Id.* at 278, 279 (emphasis added). But the Court did not view such considerations to require an absolute immunity for the publisher; consistent with the principle that only statements "honestly made" are entitled to protection, the Court held that the publisher could properly be held liable for a statement made "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. As the Court subsequently explained, the holding in *New York Times* rests on the principle that "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. . . . They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340. See also *Garrison v. Louisiana*, 379 U.S. 64, 75. Similarly, an employer's right of access to the courts loses any substantial claim to protection where, as here, the employer's suit is baseless and is brought in bad faith to accomplish an illegal purpose. At the least, the employer's "right" in such a case is outweighed by the employees' right to be free of the coercion made unlawful by §§ 8(a)(1) and (4). See also the cases holding that "sham" lawsuits may be enjoined under the antitrust laws without offending the First Amendment, *supra*, n.31.

[33] *Cf. United Credit Bureau v. NLRB*, 454 U.S. 994, 997 n.3 (Rehnquist, J., dissenting from denial of certiorari).

that the suit was brought without basis in fact and in bad faith to coerce employees in their exercise of protected rights, there is no bar to the conclusion that the employer has committed an unfair labor practice.

b) The Court of Appeals correctly reasoned that "[s]ince the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice." Pet. App. A-12. Section 10(c) of the Act, 29 U.S.C. § 160(c), specifically requires that if the Board finds that any person has committed an unfair labor practice, "the Board . . . shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this [Act]." There is no reason not to follow that statutory directive in this case; to the contrary, "the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit." Pet. App. A-12 (Court of Appeals decision).[34]

Petitioner asserts, however, that "the Board has no interest to protect that will not be properly and adequately protected by the state court." Brief for Petitioner at 17.

---

[34] A different calculus would be involved in a case where an employer's suit was filed in part for an unlawful reason and in part for the purpose of pursuing legal rights as to which the employer believed it had a legitimate claim. In such a case, if the employer showed that it would have filed the lawsuit for the latter purpose even in the absence of a retaliatory motive, an order requiring the employer to withdraw the suit might be viewed as an inappropriate "windfall" to employees who would otherwise be answerable in state court for their alleged misconduct. Cf. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274; and see the Brief of the AFL-CIO as *amicus curiae* in *NLRB v. Transportation Management Corp.*, No. 82-168. Such issues are not presented in this case, where the Board found that the employer's suit was completely unfounded and was filed in bad faith solely to accomplish an unlawful objective.

Even if that were true it would be irrelevant, for Congress has designated the Board, not the state courts, as the expert forum "to determine when the policies of the Act would be effectuated by a particular remedy." *Shepard v. Labor Board*, —— U.S. ——, 51 U.S.L.W. 4087, 4088 (Jan. 18, 1983). And, it is *not* true, for whatever may be the efficacy of the protection afforded by the Arizona courts against groundless suits (see *id.* at 29-31), those courts have neither the authority nor the competence to fashion remedies designed "to dissipate the effect of . . . unfair labor practices" [35]—the task that is the Board's and that was undertaken by the Board in this case.[36] Since the Board found that petitioner's state court action was a sham prosecuted solely as an unlawful instrument of coercion, the Board's order that petitioner cease and desist from prosecuting the suit was an appropriate, indeed necessary, remedy for the unfair labor practice found by the Board.

c) Petitioner's final contention, that the order requiring withdrawal of its suit was contrary to the Anti-Injunction Act, 28 U.S.C. § 2283, is frivolous. The contention is based on the assertion that "the subject matter of the state lawsuit—libel, trespass, and improper interference with business—was neither pending before the Board nor subject to its jurisdiction". Brief for Petitioner at 39. Leaving aside the fact that this case does not involve "libel, trespass, and improper interference with business" (as the Board found, those were false allegations advanced by petitioner in bad faith and without any basis for believing them to be true), the

---

[35] Pet. App. at A-53 (ALJ decision).

[36] For example, the Board order requires petitioner to post a notice stating, *inter alia*, that it will not subject its employees to unlawful litigation of the sort involved here, and further stating that it will withdraw its suit and will reimburse the employees for their legal expenses. Pet. App. A-56. The Board directed that this notice be posted at each of petitioner's business establishments. *Id.* at A-54.

point is that the legality under federal law of prosecuting the sham lawsuit was properly before the Board on an unfair labor practice charge, and the Board found that the prosecution of the suit constituted a violation of federal law. That being so, the case presents a "superior federal interest" which, when asserted by a federal agency (as opposed to a private party),[37] provides an established basis for enjoining a state-court suit notwithstanding the Anti-Injunction Act. *NLRB v. Nash-Finch Co., supra.* See also *Mitchum v. Foster*, 407 U.S. 225, 235-236.

CONCLUSION

For the reasons set forth above, the decision of the court of appeals should be affirmed.

Of Counsel:
MICHAEL H. GOTTESMAN
JEREMIAH A. COLLINS
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

J. ALBERT WOLL
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

---

[37] Compare *NLRB v. Nash-Finch Co., supra*, with *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, and *Vendo Co. v. Lektro-Vend Corp., supra*, note 31.